Office-Supreme Court, U.S.
FILED
JUN 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1835

In the Supreme Court of the United States

October Term, 1980

FRED CROSS AND FAMILY,
Petitioners,

vs.

DADE COUNTY SCHOOL BOARD,
MIAMI, FLORIDA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF

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QUESTION PRESENTED

Whether Petitioner has been denied his constitutional rights under the Thirteenth and Fourteenth Amendments of the United States Constitution.

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

The record before the United States Court of Appeals for the Fifth Circuit establishes the following:

On September 27, 1967, Petitioner, FRED CROSS, a counselor at Miami Jackson High School, was transferred to a sixth grade teacher at Allapattah Junior High.

From 1970 to 1975, Cross taught the fifth and sixth grade classes at Fairchild Elementary School.

On January 6, 1976, Cross was asigned to the first grade teaching assignment at Primary "C" School.

On August 26, 1976, Cross advised Dr. Charles Williams, Principal of Primary "C" School that he was neither physically nor mentally prepared to teach first graders. He worked that day (August 26, 1976) and then left and called in sick for the work days up to and including October 8, 1976. This period of time constituted authorized sick leave.

On October 8, 1976, Cross advised Dr. West, North Central Area Superintendent, that he would not report to work at Primary "C", but was available to assignment at another school. Stated otherwise, he refused to report for duty at his assigned work location and the School Board never authorized his absence from duty after October 8, 1976.

On July 11, 1977, pursuant to notice, a hearing was held before the Division of Administrative Hearings on charges filed by the Dade County School Board against Petitioner of being absent without leave from October 8, 1976 to July 11, 1977.

On August 5, 1977, Findings of Fact and Conclusions of Law were entered which held that Cross violated §231.44, Fla.Stat. by being willfully absent from his duty without leave from October 8, 1976 to the date of the hearing (July 11, 1977) and he was dismissed from his employment with the Dade County School System.

On August 24, 1977, the School Board adopted the Findings of Fact and Conclusions of Law and Recommended Order and dismissed Cross.

On December 28, 1978, more than 16 months after his discharge from employment with the School Board of Dade County, Florida, Petitioner filed a charge complaining of the School Board's action with the Equal Employment Opportunity Commission (EEOC). The EEOC notified him it dismissed his charge of discrimination because it was untimely filed. The letter stated that a charge must be filed within 180 days after the alleged violation.

On February 8, 1979, the State Board of Education of Florida affirmed the Order of Dismissal.

Petitioner's appeal to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida was dismissed on June 13, 1979 based upon his failure to comply with the Florida Rules of Appellate Procedure.

On October 31, 1979, Petitioner filed suit against the Dade County School Board, Miami, Florida, Jeff West, Superintendent of the North Central Area office in Dade County, Florida, and Steve Moore, Assistant Superintendent for Personnel, Miami, Florida, under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) et seq. alleging discrimination in employment based on color.

On March 20, 1980, the trial court entered an Order Dismissing Complaint With Leave to Amend which dismissed the Complaint against Steve Moore inasmuch as his name did not appear in the charge of discrimination Petitioner had filed with the EEOC; recited the fact that Petitioner's charge of discrimination filed with the EEOC and a similar charge filed with the State of Florida Department of Community Affairs were both denied because they were untimely; held that the timely filing of a complaint with the EEOC is a jurisdictional prerequisite for bringing a Title VII action in federal court and held that based upon *Chap-*

pell v. Emco Mach. Works Co., 601 F.2d 1295 (5 Cir. 1979) untimeliness may be excused and, therefore, allowed Cross to file an Amended Complaint setting forth in detail the reasons for his failure to timely file with the appropriate agency.

Cross filed an Amended Complaint which alleged:

1- He followed Florida School Laws 1977 Edition, Chapter 228-246, Florida Statutes.

2- On August 24, 1977, he was dismissed from the Dade County School Board System for abandoning his teaching position.

3- On September 15, 1977, he filed a Notice of Appeal with the Department of Education.

4- He thought it was more fair and just to seek justice from the Courts of the State of Florida before going into the federal court.

The Dade County School Board, Jeff West, and Steve Moore, filed a Motion to Dismiss the Amended Complaint on the grounds that: (1) the Complaint alleged jurisdiction under 42 U.S.C. §2000(e) (Title VII) and failed to allege the performance of various conditions precedent to the filing of a Title VII lawsuit; (2) the Amended Complaint failed to allege adequate facts showing equitable delay or interruption sufficient to excuse his untimeliness in filing with the EEOC and, therefore, the Court lacks jurisdiction; (3) the Complaint against Steve Moore was dismissed with prejudice and, therefore, he cannot be brought back into the action by Plaintiff's Amended Complaint; and (4) Plaintiff failed to exhaust his administrative remedies.

On April 28, 1980, the trial court entered an Order of Dismissal which held that Plaintiff's Amended Complaint failed to bring himself within any of the established exceptions which excuse an untimely filing with the EEOC.

An appeal to the United States Court of Appeals for the Fifth Circuit resulted in an affirmance. The unpublished opinion, which is cited at 636 F.2d 312 (5 Cir. 1981), held that Cross' Amended Complaint did not allege legally sufficient reasons to excuse his failure to file with the EEOC within 180 days after the alleged unlawful employment practice. The Court held that Cross' pursuit of administrative appeals to the Department of Education with the implicit suggestion that such appeals would toll the 180-day filing period was invalid in accordance with *Electrical Workers v. Robinson-Myers, Inc.*, 429 U.S. 229, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976).

The Court rejected Cross' excuse that he pursued a state court remedy with the implicit suggestion that this would toll the time for filing with the EEOC because he did not file in the state court until after the time of filing with the EEOC had expired—in fact, Cross did not appeal to the state court until after he had filed with the EEOC and, therefore, the pursuit of the state court remedies obviously could not toll the time for filing with the EEOC.

The Court rejected Cross' additional arguments that his untimely filing should be excused because he was misled by a letter he received from the EEOC dated January 2, 1979. On that date, the EEOC wrote Cross dismissing his charges because it had not been filed within the 180-day period. The EEOC's letter which mentioned his right to sue within 90 days could not have misled Cross because he received the letter after the expiration of the 180-day period and the Court said "obviously could not have had any effect at all on whether appellant did file or should have filed within the 180-day period."

The Court also rejected Cross' argument based on the "right-to-sue" letter from the Justice Department dated September 21, 1979 which was written after the expiration

of the 180-day period. The Court said that "neither letter could have misled appellant nor could have contributed in any way to his failure to file within the 180-day period."

Cross' argument that he was unaware of the underlying facts giving rise to his Title VII action before he was informed by the EEOC was rejected because it was not raised in the trial court and is clearly without merit. The Court held that the record demonstrated that Cross was aware from the beginning of the facts underlying his allegation of discrimination and that he asserted his discrimination charges from the beginning and throughout his pursuit of administrative remedies.

Cross' argument that he was unaware of the 180-day filing requirement was also rejected because ignorance of legal requirements have never been held to be a legally sufficient excuse.

ARGUMENT

Respondents submit that the Petition for Writ of Certiorari should be denied because the decision does not conflict with the decision of another federal court of appeals. *Pure Oil Co. v. Suarez,* 384 U.S. 202, 86 S.Ct. 1394, 16 L.Ed. 2d 474; *Massey Motors v. United States,* 364 U.S. 92, 80 S.Ct. 1411, 4 L.Ed.2d 1592.

The facts do not show that Petitioner has been denied a hearing, and, therefore, his constitutional argument which was never presented to the trial court or the Court of Appeals must also be rejected. *Saxbe v. Bustos,* 419 U.S. 65, 95 S.Ct. 272, 42 L.Ed.2d 231. Nonetheless, the record reflects that Cross was afforded the opportunity of a full hearing pursuant to notice by the Division of Administrative Hearings of the Dade County School Board. Merely

because the hearing was not reported does not refute this fact.

The record also reflects that Cross failed in his burden of demonstrating a valid excuse for his failure to timely file a complaint with the EEOC. The facts demonstrate that Cross was not and could not have been misled because, as stated in the decision, the EEOC letter was written and received after the expiration of the 180-day period and the Justice Department "right to sue" letter was also received after the expiration of the 180-day period.

The decision follows *Chappell v. Emco Mach. Works Co.*, supra; *Bickham v. Miller*, 584 F.2d 736 (5 Cir. 1978); and *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5 Cir. 1975) and therefore does not create conflict jurisdiction. This is apart from the fact that the decisions are from the same federal court of appeals rather than another federal court of appeals and cannot be made the basis of conflict certiorari. (Rule 17 of the Supreme Court)

Lastly, Cross' argument although never fully explored that he was denied a hearing and thus deprived of his constitutional rights under the Thirteenth and Fourteenth Amendments is patently without merit because he was afforded a full hearing and his claim of denial of constitutional rights was never raised in the lower court. *Saxbe v Bustos*, supra.

CONCLUSION

For all the reasons set forth above, Respondents, DADE COUNTY SCHOOL BOARD, JEFF WEST and STEVE MOORE, respectfully submit that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief was mailed this 23rd day of June, 1981 to: FRED CROSS, 2950 Northwest 64th Street, Miami, Florida 33147.

JEANNE HEYWARD